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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)

Distribution of the 2004-2009)
Cable Royalty Funds)

Docket No. 2012-6 CRB CD 2004-2009
(Phase II)

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In the Matter of)

Distribution of the 1999-2009)
Satellite Royalty Funds)

Docket No. 2012-7 CRB SD 1999-2009
(Phase II)

**SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF MOTION FOR
SANCTIONS AGAINST INDEPENDENT PRODUCERS GROUP AND ITS COUNSEL**

The Settling Devotional Claimants ("SDC") hereby reply in support of their Motion for Sanctions against Independent Producers Group ("IPG") and Its Counsel.

I. IPG and Its Counsel Failed to Conduct a Reasonable Review and Inquiry.

IPG admitted repeatedly that "IPG's counsel did not review or consider Dr. Cowan's report prior to its submission" *IPG's Opposition to the MPAA's Motion to Strike*, Sept. 12, 2016, at 3, n.4; *IPG's Opposition to the SDC's Motion to Strike Amended Direct Statement of IPG*, Sep. 16, 2016, at 8 n. 9.

The Judges criticized IPG's counsel's failure to review Dr. Cowan's report in their Order Granting MPAA and SDC Motions to Strike and Denying SDC Motion for Entry of Distribution Order (Oct. 7, 2016). Rather than correcting the record in a timely manner, if IPG believed its admission (or the Judges' conclusions about it) was inaccurate, IPG doubled-down, defending its position at some length and arguing that the Judges have "discouraged" such a basic exercise of

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counsel's professional obligations as reviewing an expert report before filing it. *IPG's Motion to Amend Direct Statement*, Oct. 18, 2016, at 2 n. 5.¹

IPG's admission, if true, demonstrates a plain breach of IPG's counsel's duty to ensure and certify that "allegations and other factual contentions have evidentiary support." 37 C.F.R. § 350.4(e)(1). Bottom line: The Judges must be able to trust in the diligence and the candor of the attorneys and agents who practice before them.

Remarkably, the central premise of IPG's opposition to the SDC's and MPAA's motions for sanctions is that IPG's repeated statement that its counsel did not review Dr. Cowan's report was *false*. IPG's new position, stated for the first time in its opposition to the motions for sanctions, is that upon receiving Dr. Cowan's report and before filing it, "IPG's counsel immediately set upon to review Dr. Cowan's report, but only for typographical or obvious grammatical errors," and that IPG's counsel then reasonably relied on Dr. Cowan's conclusions. IPG Opposition at 4.

A. IPG's Counsel's Review of Dr. Cowan's Report Was Inadequate and Unreasonable, and His Explanations Are Conflicting.

First, it is far too late now for IPG credibly to reverse itself on such a basic factual proposition, addressed in multiple filings by both parties and by the Judges, on a matter that is exclusively of counsel's personal knowledge and should have been accurately stated from the beginning. When IPG inexplicably believed that it was in its own best interest to claim that its counsel had not reviewed Dr. Cowan's report, it made that claim – no fewer than three times.

¹ IPG's defense of its counsel's conduct itself rings hollow, even taking it at face value. According to IPG, the Judges "made clear to IPG that the selection of data for preparation of an expert report according to the direction of any person without 'relevant training or experience in economics or econometrics', including counsel, should be equally discouraged." Yet as Dr. Cowan admits in the second paragraph of his report, he did not participate in the selection of data – it was "provided" to him. Expert Report of Charles D. Cowan, Ph.D. ("Cowan Report") ¶ 2 ("I derived a set of estimates based on my analysis of data *I was provided*") (emphasis added). IPG's assumed position, ostensibly for the protection of the independence of its expert, is entirely retrospective.

Now, after facing criticism from the Judges and while facing two motions for sanctions raising precisely that conduct, IPG reverses course, claiming that counsel reviewed the report and relied on it. The change in position is too convenient and too self-serving to be believed.

Second, even if IPG's counsel reviewed Dr. Cowan's report, "but only for typographical or obvious grammatical errors," then such a non-substantive review still falls woefully short of counsel's obligation to certify that "allegations and other factual contentions have evidentiary support." 37 C.F.R. § 350.4(e)(1).

IPG seems to concede that the Judges should apply a standard akin to the standard under Fed. R. Civ. P. 11, which contains requirements similar to 37 C.F.R. § 350.4(e)(1). IPG cites case law in the Rule 11 context to the effect that:

As long as it is reasonable under the circumstances, the court must allow parties and their attorneys to rely on their experts without fear of punishment for any error in judgment made by the expert.

Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993) (emphasis added). The SDC have no quarrel with this standard. But *reasonable* reliance on an expert's opinion is not equivalent to *blind* reliance on an expert's opinion. In the same *Coffey* case cited by IPG, the court makes clear that "[t]he attorney has an affirmative duty to inquire into the facts and law before filing a pleading." *Id.* It may be reasonable for an attorney to rely on an expert opinion that he has read carefully and made at least a basic effort to inquire into and comprehend. It is emphatically unreasonable for an attorney to rely on an expert opinion that he has not read, or has read "only for typographical or obvious grammatical errors."

B. Tardiness Is No Excuse for Professional Misconduct.

IPG argues that its counsel only received Dr. Cowan's report about an hour before filing it. The cause of this late receipt, IPG claims, was that Dr. Cowan had "advised IPG that he

believed that he now had sufficient data in order to construct an analysis that, for the first time in any distribution proceeding, attempted to implement the Shapley Valuation analysis expressly sought by the Judges,” and had provided “repeated reassurances ... that the results of the Shapley Valuation would soon be forthcoming.” IPG Opposition at 3.

But even a cursory review of Dr. Cowan’s report would have alerted IPG’s counsel to the fact that Dr. Cowan’s supposed “repeated reassurances” were false. As Dr. Cowan explains on the second page of his report, he found implementation of a Shapley valuation to be impossible. Cowan Report ¶ 8 (“Dr. Erdem understates the difficulty of using Shapley values, because no amount of expenditure would make it possible to derive the relative marginal values.”). The remainder of Dr. Cowan’s report makes no further mention of Shapley valuation, and describes an approach that is not even remotely related to Shapley valuation.² At a minimum, Dr. Cowan’s failure to apply the methodology that he supposedly described to IPG’s counsel should have raised a red flag based on any reasonable review of Dr. Cowan’s report.³

But more to the point, meeting deadlines is part of the job of being a lawyer. If IPG’s counsel truly did not have time to conduct a reasonably thorough review of Dr. Cowan’s report, then he should have sought an extension, as MPAA did when it found itself unable to meet the

² As IPG’s counsel is surely aware from extensive testimony in the 1999 cable proceeding and from the Judges’ Final Determination in that proceeding, Shapley value “gives each player his average marginal contribution to the players that precede him, where averages are taken with respect to all potential orders of the players.” *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13,423, 13,429 (Mar. 13, 2015) (quoting U. Rothblum, *Combinatorial Representations of the Shapley Value Based on Average Relative Payoffs*, in *The Shapley Value: Essays in Honor of Lloyd S. Shapley* 121 (A. Roth ed. 1998)) (internal quotations omitted). Nowhere in Dr. Cowan’s report does he discuss an application of Shapley valuation, other than to conclude it is not possible.

³ It is also reasonable to presume that an expert, who promised one result (a Shapely valuation) only to conclude (correctly) that it was impossible to achieve, would have alerted the client to that failure before finalizing and transmitting his report. Thus, it strains credulity to believe an experienced expert would have delivered to the client a very different result in his professional report barely sixty minutes before the filing deadline, with no advance warning of the adverse results. The scenario, presented by IPG primarily to ward off sanctions, is to say the least dubious.

deadline for written direct statements. (IPG's opposition to MPAA's request for an extension is now revealed as a cynical attempt to burden the parties, in light of its newfound claim that it lacked adequate time to review its own expert's report even after the extension was granted.) It is no good to say, "I did not have time to comply with my professional obligations, so I filed a pleading without complying."

C. Proper Review Would Have Prevented This Unreasonable Multiplication of Litigation.

IPG further argues that even if IPG's counsel had reviewed Dr. Cowan's report substantively, his review would not have "necessarily revealed the substantive errors contained in either Dr. Cowan's written report or the underlying electronic data." IPG Opposition at 7. In fact, IPG to this day has not "revealed" any "substantive errors" in Dr. Cowan's written report or the underlying electronic data. By all appearances, Dr. Cowan's changes – like his change from a level-level to a log-level regression – were for the purpose of reaching a desired result at IPG's request, rather than to "correct" any "errors."

But it is plain that if IPG's counsel had reviewed Dr. Cowan's report substantively, he would have at least recognized that the results were not as IPG expected or desired. If he had conducted further inquiry, he would have procured a revised report, thereby obviating the necessity of multiple rounds of amendments and multiple rounds of motions and discovery over the following eight months.

How do we know what would have happened? Because of what actually happened. Purportedly, IPG "consultant" Raul Galaz, who has no greater expertise, qualifications, or demonstrated facility in basic mathematics than IPG's counsel, recognized "promptly" upon reviewing Dr. Cowan's report that the results were not as expected or desired. Declaration of Raul Galaz, Apr. 10, 2017 ¶ 3; *see also* Declaration of Dr. Charles Cowan, Sep. 13, 2016 ¶ 11;

Declaration of Dr. Charles Cowan, Oct. 17, 2016 ¶ 4. Dr. Cowan then quickly prepared a revised report based on a new methodology after being informed of IPG's desired results, and IPG filed that revised report with its first Amended Written Direct Statement.⁴ *Id.*

In other words, contrary to the case in *Dubois v. U.S. Dep't of Agric.*, 270 F.3d 77 (1st Cir. 2001), cited by IPG, in which the court found that counsel had "no reason to question the accuracy" of its client's expert position, IPG and its counsel did have reason to question the expert's position – and they did question the expert's position – and it was as a result of their questioning IPG's expert's position that IPG subsequently filed two rounds of amended direct statements. If IPG had conducted its review and inquiries before the deadline to file written direct statements, instead of after filing a written direct statement that it had not reviewed and had not inquired into, then the parties and the Judges could have saved a lot of time and ink needlessly wasted.

Unlike in *Coffey* and *Dubois*, and also unlike in *City of Aurora v. Simpson*, 105 P.3d 595 (Colo. 2005), which cites the same standard as *Coffey*, the SDC are not faulting IPG or its counsel for failing to recognize an error in Dr. Cowan's expert opinion. Indeed, the SDC intend to show that all of Dr. Cowan's reports are littered with errors, but this is not the basis for the SDC's motion for sanctions. The SDC are faulting IPG and its counsel for filing a report without conducting any reasonable review or inquiry, and then burdening the parties and the Judges with multiple rounds of amended reports after conducting the review and inquiry that should have been conducted in the first place.

⁴ Suspiciously, the amended report was filed only *after* the SDC served IPG with its notice and motion to accept the IPG satellite share results. *See infra* at 8-9.

II. The SDC Were Prejudiced By IPG's Failure to Review Its Initial Written Direct Statement and Its Failure to Preserve Data Underlying Its First Amended Written Direct Statement.

IPG's entire argument relating to prejudice is based on an extended series of misstatements:

IPG asserts that only a "modicum of effort" was required to revise the SDC's discovery requests at the last moment after IPG filed its first Amended Direct Statement (which was ultimately stricken). IPG Opposition at 19. With all due respect, IPG does not have the slightest clue what effort was required to conduct discovery related to the seriatim filings. First, the SDC had to quickly do their best to revise discovery requests on the day they were due in order to address an Amended Direct Statement that they had not yet thoroughly reviewed and that they did not know would eventually be stricken. The SDC then had to conduct multiple levels of review of IPG's discovery, employing the services of expert consultants, only to discover that IPG had not produced the data and analysis underlying either its initial Written Direct Statement or its first Amended Direct Statement. The SDC then had to endure multiple rounds of communications with IPG's counsel, in which IPG's counsel feigned ignorance of the SDC's requests.⁵ And, of course, the multiple rounds of motions, including discovery motions, that flowed from IPG's amended filings were all necessitated by IPG's failure to review its initial filing.

⁵ IPG asserts that the SDC's observation that IPG's counsel feigned ignorance constitutes "vitriol." The SDC stand by their observation. Any reasonable reading of the SDC's discovery requests and subsequent email exchange with IPG's counsel demonstrates that IPG's counsel pretended not to understand the SDC's request for data underlying IPG's first Amended Direct Statement. It was only after the SDC's counsel made this request multiple times that IPG's counsel finally admitted, or asserted, that the underlying data had not been retained. A more complete description of the history of these communications is set forth in the SDC's Motion to Compel IPG to Produce Documents, Oct. 17, 2016, which also includes copies of the relevant document requests and email exchanges.

IPG asserts that Dr. Cowan's "amended report differed from his initial report in only a handful of ways, predominantly the substitution of table percentages and the correction of typographical errors" IPG Opposition at 21. Actually, as has been discussed extensively in multiple pleadings, the most predominant change in Dr. Cowan's report aside from the substitution of table percentages was the substitution of a log-level regression specification in place of a level-level regression specification. But the extent of the changes in the text of Dr. Cowan's report has never been the most prejudicial problem. The far bigger problem is that Dr. Cowan does not explain, and has never explained, the changes that were made or the reasons for making them. The SDC have been left completely in the dark in trying to understand the rationale underlying the changes, if any rationale exists other than to achieve IPG's preferred results.

IPG asserts that it produced data underlying both its initial Written Direct Statement and its Amended Direct Statement. IPG Opposition at 6. Actually, as is detailed more thoroughly in multiple rounds of motions that have already been decided, including SDC's Motion to Compel IPG to Produce Documents, IPG at first produced data and code files that generated results that did not match either its initial Written Direct Statement or its first Amended Direct Statement. When the SDC brought this to IPG's attention, IPG then produced documents underlying its initial Written Direct Statement and, eventually, a new set of results that IPG later filed with its second Amended Direct Statement. To this day, IPG has not produced the data underlying the satellite results in its first Amended Direct Statement, which leaves the SDC unable to assess fully either the changes from IPG's initial Written Direct Statement to its first Amended Direct Statement or the changes from its first Amended Direct Statement to its second Amended Direct Statement.

IPG asserts that the SDC's Notice of Consent to 1999-2009 Satellite Shares Proposed by IPG and Motion for Entry of Distribution Order was "openly contradictory of a prior ruling of the District of Columbia Court of Appeals, a ruling that was specifically advocated to the Court of Appeals by the SDC." IPG Opposition at 26. (We perceive that IPG intended to refer to the U.S. Court of Appeals for the District of Columbia Circuit, and not the District of Columbia Court of Appeals, which is a different court.) IPG is wrong. The D.C. Circuit has never held, and the SDC have never argued, that "the Judges' distribution orders must be based upon a specific adopted methodology, and cannot simply adopt the figures of parties even if the methodological results of the parties come to the identical conclusion." IPG Opposition at 27. In the 2000-2003 cable case, the distribution order that was reversed on appeal utilized IPG's figures based on a rejected methodology. The award for every year was below the figures requested by the SDC, and the SDC consented to none of the amounts awarded. Only in one year was the result even within the "zone of reasonableness" proposed by the SDC, but even that one was below the SDC's proposed award.

Had IPG consented to the SDC's proposed awards, the SDC would have had no basis to object or to appeal. Where both parties consent to the same award, the Judges would be well within their discretion to order the distribution, because there is no relevant controversy, even if the parties cannot agree on how they reach the same result.

IPG suggests that the SDC should have instead proposed acceptance of the SDC's own proposed satellite distributions, which were on the whole better for IPG than IPG's initial proposed distributions. As the Judges have already observed, "The SDC's theory for distributing the satellite funds without a trial is that, by consenting to IPG's proposal, the SDC have removed any controversy. The SDC's consenting to their own proposed shares would hardly advance that

theory.” *Order Granting MPAA and SDC Motions to Strike and Denying SDC Motion for Entry of Distribution Order* (Oct. 7, 2016) at 6 n. 9.

IPG asserts that the SDC did not issue follow-up discovery requests after IPG’s failure to produce documents satisfactorily. IPG Opposition at 23. This is false. The SDC made follow-up requests, first informally and then formally. Those follow-up requests were the subject of the SDC’s Motion to Compel IPG to Produce Documents (Oct. 17, 2016).

IPG asserts that the SDC’s Motion to Compel IPG to produce documents, including work product, relating to its first Amended Direct Statement “was voluntary, exemplified inaccurate legal argument, and was entirely unnecessary.” IPG Opposition at 28. IPG ignores the fact that the SDC substantially prevailed on the motion to compel, based on the Judges’ finding that “the SDC indeed have a ‘substantial need’ for these materials that is sufficient to overcome the work product rule, even assuming *arguendo* that rule were to apply in this instance.” *Order Granting in Part and Denying in Part SDC’s Motion to Compel IPG to Produce Documents* (Jan. 3, 2017) at 4. The Judges’ Order compelling discovery was limited only to exclude documents covered by “opinion work product” (which the SDC didn’t specifically request, although a “broad” reading of the SDC’s requests might have included them) and attorney-client privileged communications between IPG’s counsel and Mr. Galaz, who the SDC argued unsuccessfully, but in good faith, did not fall within IPG’s attorney-client privilege based on his own admission that he was not an IPG employee.

The only reason IPG has not produced the documents required by the Judges’ Order on the SDC’s motion to compel is IPG’s assertion that there are no communications whatsoever explaining why Dr. Cowan made corrections to his original report and incorporated those corrections into his Amended Report. The very lack of any such communications, if true, only

underscores IPG and its counsel's complete failure to conduct an adequate inquiry into the initial report and subsequent changes.

Relatedly, IPG claims that the SDC's Motion to Compel was unnecessary because IPG had already indicated that the documents sought do not exist. IPG Opposition at 30. This is false. IPG's answer to each and every one of the follow-up discovery requests that were the subject of the SDC's Motion to Compel was as follows:

Objection. The requested documents are privileged. Additionally, the requested documents are not a "follow-up" to produced documents, and are therefore outside the scope of allowed discovery. No documents will be produced.

See Motion to Compel IPG to Produce Documents (Oct. 17, 2016) at Ex. A. Nothing in this answer suggests that the documents did not exist. To the contrary, how can a document be "privileged" if it does not exist?

IPG engages in a *reductio ad absurdum* by asserting that the "SDC go so far of accusing IPG counsel of failing to instruct Dr. Cowan to keep all iterations of his analysis, without qualification," and asserting that this means "by analogy to correspondence or a pleading that there must be a separate saved version of such documents created after every paragraph, every sentence, and every letter typed." IPG Opposition at 30, n.16. The SDC have never made such a preposterous claim. The SDC do not allege that an expert must retain every iteration of an analysis. But when IPG actually filed its first Amended Direct Statement, it should have instructed its expert to retain the data and analysis underlying the Amended Direct Statement that was actually filed. Had IPG done so, the SDC would have had no need to file their motion to compel, and would today have sufficient information to identify and evaluate the very substantial changes from IPG's initial Written Direct Statement to its first Amended Direct Statement, and from IPG's first Amended Direct Statement to its second Amended Direct Statement.

IPG argues pointlessly that MPAA failed to produce underlying data in the 2000-2003 cable case. IPG Opposition at 25. The Judges considered and rejected IPG's argument in that case, which has now been affirmed on appeal in the Program Suppliers category. What relevance IPG's contentions in that case have in this case is not explained. Certainly, nobody has ever had cause to allege that MPAA's counsel failed to review or to make an effort to understand its expert witnesses' reports.

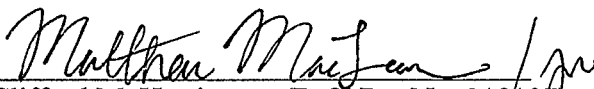
Likewise, IPG argues that the SDC have engaged in "far more egregious instances of abuse," referring to IPG's various motions relating to Alan Whitt's preparation of the distant HHVH data relied upon by the SDC in the 1999 cable proceeding. IPG's recounting of this particular set of discovery disputes is both irrelevant and completely inaccurate. There is no reason to revisit it here. But if the Judges wish to take this jaunt down memory lane, attached is the Declaration of Matthew J. MacLean, admitted into evidence as SDC-R-007 on IPG's motion in limine in the 1999 cable proceeding, containing a comprehensive description of the discovery dispute. The Judges denied IPG's motion, and the D.C. Circuit affirmed.

III. Conclusion

For the foregoing reasons, the SDC's Motion for Sanctions should be granted.

Date: April 14, 2017

Respectfully submitted,


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CERTIFICATE OF SERVICE

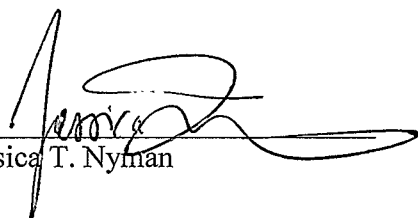
I, Jessica T. Nyman, hereby certify that a copy of the foregoing was sent electronically and by overnight mail on April 14, 2017, to the following:

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EXHIBIT A

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of)	
Phase II Distribution of the 1998)	Docket No. 2008-1
and 1999 Cable Royalty Funds)	CRB CD 1998-1999 (Phase II)
)	

DECLARATION OF MATTHEW J. MACLEAN

I, Matthew J. MacLean, hereby state and declare as follows:

1. I am a litigation partner in the law firm of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"). I am counsel for the Settling Devotional Claimants ("SDC") in the proceeding referenced above. I submit this declaration to provide background information in response to the argument by counsel for Independent Producer's Group ("IPG") relating to the SDC's discovery responses regarding the selection of stations used in the Household Viewing Hours report (the "HHVH report" compiled by Alan Whitt from data obtained from MPAA, and relied upon by John Sanders, the SDC's valuation expert).
2. Mr. Whitt's company, IT Processing LLC, was employed by MPAA from about 2000 to 2011 for the purpose of assembling compilations of data for MPAA, including data used by MPAA in various cable and satellite royalty proceedings. *See* Direct Testimony of Alan Whitt ("Whitt Direct") at 2-3. A part of that work involved the creation of the MPAA's merged databases, each of which was a compilation of Nielsen and Tribune data acquired by MPAA based on samples of stations selected by Marsha Kessler, an employee of MPAA. Transcript, April 8, 2014, 105:7-105:18 and 108:15-110:2.
3. The Nielsen data consisted of custom data from Nielsen, by station, showing estimated distant viewing by station on a quarter-hour by quarter-hour basis. The Tribune data consisted of

data from Tribune Media Services, showing information relating to programming on each station including, importantly, title, time of broadcast, length of broadcast. On behalf of MPAA, Mr. Whitt merged those Nielsen and Tribune data, by quarter hour, to create the "Raw Merge" files. Transcript, April 8, 2014, 108:15-110:2.

3. In 2006, with MPAA's consent, the SDC engaged Mr. Whitt to compile reports of devotional viewing from MPAA's Raw Merge files for the years 1999, 2000, 2001, 2002, and 2003. Mr. Whitt compiled devotional HHVH reports for each of these years at the same time and in the same manner. Transcript, April 8, 2014, 106:9-108:10. To do this, Mr. Whitt ran search terms on the Raw Merge files in order to cull the data down into a report including only devotional programs, by station. Because stations that did not include programs responsive to search terms were not responsive to the search, the HHVH report would not include any lines for stations with no responsive programming.

4. Although not contained in his Written Direct Testimony, Mr. Whitt has testified orally that he conducted a quality control review of the HHVH report to remove certain programs that were responsive to his search terms but obviously not devotional in nature (e.g., the 1940 movie, "Dr. Christian Meets the Women,") and to combine certain program titles on the same station that were obvious variants on the same title (e.g., "Salem Baptist" and "Salem Baptist Church"). Transcript, April 8, 2014, 127:22-130:8. No program eliminated by Mr. Whitt from the HHVH report is claimed in this proceeding.

5. The end result of Mr. Whitt's effort was the HHVH report, showing a list of programs responsive to Mr. Whitt's search terms (minus a few that he had eliminated through his quality control review). Mr. Sanders relied upon the HHVH report, in conjunction with other available data, in reaching his conclusions regarding relative fair market value in this proceeding.

6. When Mr. Whitt retired in 2011, he returned to MPAA most of the data and almost all of the program files used to merge and sort the data to MPAA. However, the 1999 Nielsen data (in SAS format), the 1999 Tribune data (in comma separated value format), and a fragment of code used in the merger of those files remained on a disabled hard drive in Mr. Whitt's basement.

7. As Mr. Whitt has explained, the HHVH report was ultimately derived from three sources:

- 1) programs on a sample of television stations chosen by Marsha Kessler, based on where the signals were distant for cable copyright purposes.
- 2) distant program viewing data for those programs [i.e., the programs on the television stations chosen by Marsha Kessler] from Nielsen's six "sweep" months of diary data ... [commonly referred to in these proceedings as the "Nielsen data"]; and
- 3) Tribune Media Services ... database of TV program information [commonly referred to in these proceedings as the "Tribune data"]

Whitt Direct at 3.

8. Mr. Whitt then explained how he merged the Nielsen data with the Tribune data by quarter hour, and explains how he searched the merged data set using search terms to cull it down to devotional programs. Whitt direct at 4-6. He did not state or suggest that he further narrowed down the station selection to any subset of the Nielsen data. Indeed, his testimony is clear that the Nielsen "distant program viewing data" consisted of data "for those programs" that were on the "sample of television stations chosen by Marsha Kessler." Whitt Direct at 3.

9. Mr. Sanders, the SDC's valuation expert, reviewed the HHVH report, Mr. Whitt's written testimony, and other information, including written and oral testimony from MPAA witnesses in the 1998-1999 Phase I and 2000-2003 Phase II cable proceedings. Although no testimony in any other proceeding has addressed precisely the same dataset from which the HHVH report was generated, the testimony from other proceedings showed that Marsha Kessler routinely ordered Nielsen data for similar MPAA studies, and that samples were selected from among stations that

received substantial distant retransmission according to a report prepared by Cable Data Corp. ("CDC"). *See, e.g.*, SDC0000278, 6383:13:18; SDC0000281-85, 6387:3-6389:2; SDC0000314-15, 6422:6-6423:4. Mr. Sanders and SDC's counsel, including me, all assumed and believed (and still believe) that Ms. Kessler's 1999 Phase II station selection was not chosen randomly, but was chosen based on information from CDC, just as samples for other similar studies had been chosen. Indeed, CDC data is the most easily available data identifying retransmitted stations (as opposed to stations that are not retransmitted), and is therefore the only likely source of Ms. Kessler's station selection for the HHVH report.

10. Therefore, in order to address an anticipated criticism that the sample was non-random, Mr. Sanders noted in his Written Direct Testimony:

The [HHVH report] is based on a sample [of] stations selected by Marsha Kessler, who chose the stations that received substantial distant retransmission according to a report prepared by Cable Data Corp (hence, a non-random selection). To the extent that MPAA sought to use the results to make projections to the entire universe of cable distant viewing, the non-random sample was deemed to create a problem with making projections to a larger universe of compensable programs.

[W]hile data is derived from only a sample of distantly retransmitted signals, the sample employs viewing results from the most distantly retransmitted broadcast stations as reported by Form 3 cable systems.

Sanders Direct at 7-8.

10. In these passages, Mr. Sanders was not attempting to identify which stations were in the sample, but was merely setting up a potential criticism of Ms. Kessler's practice of selecting stations based on CDC data so that he could consider and respond to that potential criticism.

11. Attached hereto as Exhibit A is a true and correct copy of the SDC's combined responses and follow-up responses to IPG's discovery requests and follow-up requests. In IPG's discovery

request number 8, IPG sought information concerning the sample of stations selected by Ms. Kessler. In particular, with respect to Mr. Whitt's testimony, IPG requested:

Direct Testimony of Alan G. Whitt

Any and all documents underlying or used to support the following statements:

8) "The report was derived from three sources: ... programs on a sample of television stations chosen by Marsha Kessler"

12. The SDC responded to this request as follows:

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct statement of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See documents in Category No. 7, which have been produced.*

13. The documents in Category No. 7 consisted solely of the data and code files provided by Mr. Whitt from his disabled computer, including all the Nielsen data and all the Tribune data used by Mr. Whitt to prepare the HHVH report. Category No. 7 did not include any testimony from Ms. Kessler, because the SDC did not have any testimony from Ms. Kessler identifying the particular "sample of television stations chosen by Marsha Kessler." The SDC understood, as Mr. Whitt has testified, that the sample was embodied in the Nielsen data that Ms. Kessler ordered based on her station selection.

14. IPG served a follow-up request regarding the SDC's response to request number 8 asking for more specific identification of the documents containing the relevant information:

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the date-number accorded to the SDC-produced documents.

15. The SDC responded to IPG's follow-up request:

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001191.

16. SDC0001191, the *only* document specifically identified in response to IPG's follow-up request regarding Ms. Kessler's selection of stations, is the SAS data file containing the Nielsen data. The SDC produced SDC0001191 completely, and in the native SAS data format in which Mr. Whitt had it. This file is the only file in the SDC's possession that embodies Ms. Kessler's selection of stations. As Mr. Whitt has testified, Ms. Kessler only ordered data from Nielsen on the stations that she had selected. Transcript, April 8, 2014, 113:21-114:16. To determine what stations Ms. Kessler selected, one need only look at what stations are included in the Nielsen data that she ordered. Therefore, although the SDC do not have any separate document listing the stations selected by Ms. Kessler, the Nielsen SAS data file is fully and accurately responsive to IPG's discovery request number 8, regarding the sample of television stations chosen by Ms. Kessler.

17. In IPG's request number 24, IPG made a similar request, but with respect to a statement in the Direct Testimony of John Sanders ("Sanders Direct"):

Direct Testimony of John Sanders

Any and all documents underlying or used to support the following statements:

...

24) "The IT Processing Data Report is based on a sample stations selected by Marsha Kessler."

18. Again, as with IPG's request with respect to the equivalent statement in the Whitt Direct, the SDC responded to the request solely by reference to the data and code files produced by Mr. Whitt:

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct statement of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See documents in Category No. 7, which have been produced.*

19. When IPG made a follow-up request for more a more specific document reference in response to this request, SDC again identified only the Nielsen SAS data file, and no other documents or testimony, because that is the only document in the SDC's possession containing the Kessler sample:

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001191.

20. Again, the SDC identified no testimony or other documents in response to this request, because the entirety of the Nielsen data file consists of the sample selected by Ms. Kessler.

21. In IPG's request number 26, IPG made what the SDC reasonably interpreted to be a different request:

Direct Testimony of John Sanders

Any and all documents underlying or used to support the following statements:

26) "... the sample employs viewing results from the most distantly retransmitted broadcast stations as reported by Form 3 cable systems."

22. SDC's counsel did *not* interpret this request as seeking identification of Ms. Kessler's sample, especially since we had already identified the entirety of Ms. Kessler's sample by reference to the Nielsen SAS data file in response to specific requests regarding the sample of stations used by Mr. Whitt in preparing the HHVH report. Instead, we interpreted request number 26 only as seeking the documents on which Mr. Sanders relied when he concluded that the sample was based on CDC data reports from Form 3 cable systems. In fact, Mr. Sanders had

relied on Ms. Kessler's testimony regarding her use of data from CDC for the selection of other, similar samples. This is also how he was aware that Ms. Kessler's sampling method had been criticized for being non-random, and why he felt it necessary to identify that objection and respond to it in his testimony.

23. We had no testimony relating to the particular station sample at issue in this case, but Mr. Sanders had reviewed Ms. Kessler's 1998-1999 Phase I testimony concerning other stations samples selected for use by MPAA for a similar purpose relatively close in time. Ms. Kessler's written and oral testimony from the 1998-1999 Phase I proceeding had a reasonably fulsome explanation of her expertise and practices in connection with developing station samples for copyright royalty proceedings. We believed, and still believe, that she employed a similar process in selecting stations for MPAA's 1999 Phase II study, which is the basis for the HHVH report. Accordingly, we identified Ms. Kessler's 1998-1999 Phase I testimony in response to IPG's request.

24. In identifying Ms. Kessler's 1998-1999 Phase I testimony, we did not mean, and did not intend to imply, that MPAA's Phase I station selection for 1999 was identical to the Phase II HHVH station sample. Indeed, it is obvious that the samples are not identical, since the stations identified in MPAA's Phase I selection are largely not the same as the stations identified in the Nielsen SAS data file, which are the only stations that either Mr. Whitt or the SDC have ever identified as Ms. Kessler's station selection. Nor are they the same stations that appear in the HHVH report. Phase I presents different considerations than Phase II, and a different station selection is necessarily required. For example, MPAA's station samples for Phase I include many educational stations, which are not at issue in Phase II in the program suppliers category in which MPAA participates. Transcript, April 8, 2014, 246:2-246:18. The relationship between

Ms. Kessler's 1998-1999 Phase I testimony and her station selection in 1999 Phase II is her description of the process of using CDC data to assist the station selection process, which was the aspect of her testimony on which Mr. Sanders relied.

25. It is important to note that Mr. Sanders brought up the non-random selection method for the purpose of considering a criticism of Ms. Kessler's methodology, not because it affirmatively supported the SDC's case. He made a reasonable assumption that if the 1998-1999 Phase I samples were based on CDC data, the Phase II sample was likely also based on CDC data, and was therefore non-random and subject to a possible criticism on that basis.

26. There are many other places in which Mr. Sanders reviewed and considered testimony from other cases, even though it was clear that different samples were involved. *See, e.g.*, Responses to IPG request numbers 21, 22, 25, 31, and 33, all of which identify testimony from the 2000-2003 cable case, which obviously involve different samples, but which Mr. Sanders concluded bore sufficient similarity to the sample used in the HHVH report that the testimony could be considered in drawing certain conclusions about the sample. His use of Ms. Kessler's 1998-1999 Phase I testimony was no different. He considered testimony relating to a similar samples used by the same party (MPAA) with the involvement of the same individual (Ms. Kessler) in order to draw certain conclusions and consider certain criticisms regarding the sample used for the HHVH report.

27. After exchange of discovery, IPG filed a motion to compel the SDC to produce electronic files (including the Nielsen data, the Tribune data, and a SAS code file) in a different format. The Judges granted that motion and ordered the parties to designate persons with computer expertise in order to allow use of the electronic files. *See Order Granting IPG's Motion to Compel Production of Electronic Files (Jan. 31, 2014).*

28. Shortly after the Judges entered their order on IPG's motion to compel, IPG's counsel informed SDC's counsel that IPG had been able to open the files, and that it was no longer necessary for the SDC to produce the files in IPG's preferred format. IPG's counsel stated that it was no longer necessary to have the conference call ordered by the Judges. After IPG's expert, Dr. Laura Robinson, reviewed the files, however, IPG's counsel requested SDC's counsel to have the conference call for the purpose of discussing the merger of the Nielsen and Tribune data.

29. That conference call took place on February 18, 2014. Mr. Whitt and I were present on the conference call for the SDC. Dr. Robinson, Brian Boydston, and Raul Galaz were present for IPG. The content of the call is fully described in an exchange of emails between IPG's counsel and SDC's counsel, attached hereto as Exhibit B. Although the two accounts have variations, each attorney's account of the call agrees that Mr. Whitt described his process as merging the Nielsen data with the Tribune data, and then using his search terms to cull the merged set down to devotional programs.

30. According to IPG's counsel:

Mr. Whitt ... explained that the "cas" files contain Tribune Media data, that the "sas7bdat" file contained Nielsen Media Research data, and that the "intermediate" step that merges the "cas" and "sas7bdat" datasets was not produced by the SDC. ...

It was also clarified that the results produced by that merger are subsequently culled down to just devotional program titles, but that the electronic file that performs that additional intermediate step was not produced either.

31. Similarly, the SDC's counsel described the conversation as follows:

As is set forth in [Mr. Whitt's] written testimony, and as he described again today, it is a two-step process: First, he merged the Nielsen data with the Tribune data. Second, he culled out devotional programs using

the search criteria set forth in his written direct statement. His report is the result of that process. ...

All that is necessary to replicate or test Mr. Whitt's results is to merge the data files – which you are now capable of accessing in full – and then to search for devotional programs using Mr. Whitt's search criteria or other search criteria of your own creation. ...

32. Nowhere was it suggested that there was another step in the process to filter the results using any other list of stations selected by Ms. Kessler. It was understood by all on the conference call, and clearly stated by counsel for both sides in emails following the conference call, that the process was simply to merge the Nielsen data with the Tribune data and then run the search terms on the merged set.

33. Indeed, when IPG moved to strike portions of the SDC's written direct statement on the ground that the SDC had not produced the "intermediate" files used to generate Mr. Whitt's results, IPG admitted in its reply brief in support of that motion that it understood that Mr. Whitt's results were the result of merging the Nielsen data with the Tribune data, and then conducting a search on the merged database. *See* IPG's Reply in Support of Motion to Strike Portions of SDC's Direct Statement at 5-6 (March 4, 2014). IPG argued only that because the merger could be performed in different ways, it might lead to different results.

33. At the hearing on IPG's motion to strike, Dr. Robinson testified as to her process to attempt to replicate Mr. Whitt's results, correctly demonstrating her understanding of the process that Mr. Whitt described, although she reached a different result:

Re-Direct Examination by Mr. Boydston

Q. Counsel was pressing – pressing you on whether or not you could make the calculation on a line by line basis, and you explained you could try to do what Mr. Whitt says he was doing, but you don't have the programs ...

My understanding is what you're getting at is that the problem is, is that even if you do that, you come up with 78 stations, as opposed to 72. Could you please explain that in detail? ...

A. If you take the Tribune data, and when I took the Tribune data, and I took the Nielsen data, and I used the criteria of devotional religious, and the character strings that he did, the total number of stations where they were in the Tribune data, during the sweep months, they were in the Nielsen data, and they met one of those three criteria, I got 78 stations. He got 72.

...

JUDGE STRICKLER: Again, just so I understand, so you had -- to that level, you were able to replicate what he did and come up with a different result, at least with regard to the number of stations?

A. Yes.

JUDGE STRICKLER: So, replication was possible, but the replicated process came out to a different result?

A. Yes.

Transcript, April 8, 2014, 96:17-98:11.

34. The difference in the result was later explained in the same hearing to be the result of (1) a "quality control" process conducted by Mr. Whitt in which he eliminated programs that were clearly not devotional (like "Dr. Christian Meets the Women") and programs that were clearly not program titles (like "religious special"), and (2) an unexplained error resulting in the omission of "Billy Graham" from his results. Transcript, April 8, 2014, 127:22-130:8.

35. Mr. Whitt also testified that there the Nielsen data consisted only of the stations that Ms. Kessler had selected, and that there was no additional step to cull down the Nielsen sample to a separate list of stations selected by Ms. Kessler:

JUDGE FEDER: Did you perform any separate step using that set of sample stations or did you -- in essence, was the Nielsen data pre-filtered for that sample of stations?

MR. WHITT: The Nielsen data was -- they only ordered stations from Nielsen that were in the study.

JUDGE FEDER: Okay, so there was no --

MR. WHITT: In the sample.

JUDGE FEDER: -- separate step to screen out extraneous stations?

MR. WHITT: I don't believe so. Sometimes stations were added or subtracted during the process, but they were always based on the sample, and for 1999, I can't remember any exceptions to that.

Transcript, April 8, 2014, 113:21-114:16.

36. It was only during Dr. Robinson's rebuttal testimony at the hearing on April 8, 2014, that it was revealed, for the first time, that Dr. Robinson believed (or claimed to believe) that the Kessler sample of stations used by Mr. Whitt were identical to (or supposed to be identical to) a list of stations from Ms. Kessler's testimony in the 1999 Phase I proceedings. Transcript, April 8, 2014, 223:4-236:2. This came as a complete surprise to me, especially after the conference call in which Mr. Whitt explained his process, and after Dr. Robinson's direct testimony in which she described the process that she attempted to replicate.

37. I explained, in Dr. Robinson's presence while she was on the witness stand, that the "Kessler stations" used by Mr. Whitt were the stations that were ordered from Nielsen, and not the same stations that Ms. Kessler used for her Phase I analysis:

MR. MACLEAN: Your Honor, the Kessler sample was simply the order that was delivered to Nielsen, to retrieve the -- to get the Nielsen data. So the Kessler stations are the stations that appear in the Nielsen data.

...

It is our understanding that ... they are not or may not be the same list that MPAA used for the Phase I proceeding.

Transcript, April 8, 2014, 231:10-234:7.

37. Dr. Robinson subsequently admitted that this is what Mr. Whitt himself had told her - that the stations he used were the stations contained in his Nielsen set of data:

Q. If Mr. Whitt testified here today that in fact, the stations that he used were the stations contained in the Nielsen data set, is that consistent with your own observations?

A. ... Mr. Whitt did tell me that he used the SAS data set that incorporated Nielsen data for his analysis.

Transcript, April 8, 2014, 248:4-248:16.

38. In their Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement, the Judges specifically found, as the testimony clearly demonstrated, that "[t]he Nielsen stations that Mr. Whitt considered were the same stations selected by Ms. Kessler." Order at 2, n. 3 (May 2, 2014). Dr. Robinson testified in the distribution hearing on September 4, 2014, that she had reviewed that Order. Transcript, September 4, 2014, at 119:6-8.

39. Therefore, Dr. Robinson's testimony on September 4, 2014, was false when she said that she had "never heard" that the "the Nielsen data [Mr. Whitt] provided and used was itself composed of the stations on the list compiled by Marsha Kessler." She heard it from Mr. Whitt on the conference call on February 18, 2014; she heard it from me in the courtroom on April 8, 2014; and she had the opportunity to read it in the Judges' Order on IPG's Motion to Strike, issued on May 2, 2014.

I hereby declare under penalty of perjury that the foregoing is true and correct.

September 8, 2014



Matthew J. MacLean

EXHIBIT A



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January 3, 2014

Brian D. Boydston
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Re: *Docket No. 2008-1 CRB CD 1998-1999*
Distribution of 1998 and 1999 Cable Royalty Funds
Settling Devotional Claimants' Responses to IPG's Follow-Up
Document Discovery Requests

Dear Mr. Boydston:

In connection with the Direct Statement of the Settling Devotional Claimants (the "SDC") filed in connection with the above-referenced proceeding, the SDC hereby submit responses to the follow-up discovery requests of Independent Producers Group ("IPG"). The Instructions and Definitions set forth in our original requests dated December 9, 2013, apply equally to these responses to IPG's follow-up requests.

REQUESTS AND FOLLOW-UP REQUESTS

Written Direct Statement

Any and all documents underlying or used to support the following statements:

- 1) "The ACG/WSG claims filed for devotional claimants contain egregious fraudulent misrepresentations"

SDC Response: Any nonprivileged responsive documents will be produced. *See Documents in Category No. 2, which have been produced.*

- 2) "It Is Written, Inc., producer of 'It Is Written,' expressly disavowed any authority of IPG to represent it."

SDC Response: The SDC object to this request to the extent that it seeks production of documents to which IPG already has access. *See General Objection*

No. 6. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See Documents in Category No. 2, which have been produced.*

- 3) "The MPAA allowed Mr. Whitt to prepare a report of distant signal viewing data of devotional programs, derived from a selected list of TV stations chosen by Marsha Kessler."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

- 4) "Mr. Whitt's report for the SDC consists of the results of viewing to devotional programs drawn from Nielsen Company diary data in distant cable households."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *[No documents identified or produced.]*

- 5) "Mr. Whitt correlated Nielsen quarter hour data to Tribune Media's television program listings for the Kessler stations."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *[No documents identified or produced.]*

- 6) "The IT Processing report was provided to the SDC in 2006."

SDC Response: The SDC object to this request because IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *See General Objection No. 6. [No documents identified or produced.]*

- 7) "The Settling Devotional Claimants designate the following additional record testimony . . . :

- a. Marsha Kessler: June 2, 2003 (pp. 6347-6454); June 3, 2003 (pp. 6456-6613) July 14, 2003 (pp. 9478-9491); and July 15, 2003 (pp. 9724-9753);
- b. Paul Lindstrom: June 9, 2003 (7175-7445);
- c. Paul Donato: June 9, 2003 (pp. 7445-7520).

SDC Response: Any responsive documents will be produced. *See Documents in Category No. 1, which have been produced.*

Direct Testimony of Alan G. Whitt

Any and all documents underlying or used to support the following statements:

- 8) "The report was derived from three sources: . . . programs on a sample of television stations chosen by Marsha Kessler . . ."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bates-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001191.

- 9) "The report was derived from three sources: . . . distant program viewing data for those programs from Nielsen's six 'sweep' months of diary data . . ."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bates-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been — produced at SDC0001191.

- 10) "The report was derived from three sources: . . . Tribune Media Services ('TMS') database of TV program information . . ."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its

accompanying Exhibit. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bates-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001179-SDC0001191.

- 11) "I understand that MPAA reviewed the TMS database to ensure that programs listed as airing actually aired."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bates-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001179-SDC0001190.

- 12) "Part of my task was to match the Nielsen 1-96 numerical assignments with the TMS programming and time/date information."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that

are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bate-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001177 and SDC0001191.

- 13) "For the SDC Nielsen Devotional HHVH Report, the reporting rows were selected by identifying 'Categories' with 'Devotional' and/or a Subtype of 'Religious.'"

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bate-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001179-SDC0001191.

- 14) "The selected rows were then aggregated by title and station summing the adjusted household viewing hours from Nielsen."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bate-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: IPG has already been provided with Exhibit 1 to the written direct Testimony of Alan G. Whitt. Further

responsive documents have been produced at SDC0001191.

All documents necessary to verify the bottom-line figures appearing in:

15) Exhibit 1.

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

Direct testimony of John S. Sanders

Any and all documents underlying or used to support the following statements:

16) "I also reviewed the *Report of Household Viewing Hours from 1999 MPAA Copyright Royalty Data Base Showing Cable Viewing Data for 1999 Prepared by IT Processing LLC on December 8, 2006* (Appendix B)"

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *[No documents identified or produced.]*

17) "I also reviewed . . . Nielsen Media Research, "Report on Devotional Programs February 1999." Nielsen Station Index Average Week Television Audience Measurements Based on February 4 – March 3 ("Nielsen RODP")."

SDC Response: Any nonprivileged, responsive documents will be produced. *See Documents in Category No. 5, which have been produced.*

18) "The HHVH data was derived from Nielsen data contemporaneous with the six sweep measurement periods in 1999."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the

responsive documents according to the date-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001191.

- 19) "Each of the SDC, through their representatives, sent an email confirming the SDC programs on this list."

SDC Response: Any nonprivileged, responsive documents will be produced. *See Documents in Category No. 6, which have been produced.*

- 20) "I was advised by SDC that two owners listed by IPG (St. Jude's Hospital and Willie Wilson Productions) were not producers of devotional programs, and a third claimant, It Is Written, formally disavowed IPG's authority to represent it in this case."

SDC Response: The SDC object to this request to the extent that it seeks production of documents to which IPG has equal access. *See General Objection No. 6.* As to the requests concerning St. Jude's Hospital and Willie Wilson Productions, the SDC also object to this request to the extent that they are irrelevant, insofar as IPG did not make any claim for these putative owners. *See General Objection No. 1.* Subject to the foregoing objections, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 2, which have been produced.*

- 21) "Where programs are homogenous, the most salient factor to distinguish them in terms of subscribership is the size of the audience,"

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1.* Other responsive documents are publicly available. *See General Objection No. 6; see also Phase II Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, 78 Fed. Reg. 64984 (Oct. 30, 2013). [No documents identified or produced.]*

- 22) "A religious program with a larger audience is more likely to attract and retain more subscribers [for] the cable system operator, and is therefore of proportionately higher value."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1.* Other responsive documents are publicly available. *See General Objection No. 6; see also Phase II Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, 78 Fed. Reg. 64984 (Oct. 30, 2013). [No documents identified or produced.]*

- 23) "Nielsen ratings data is . . . generally regarded as the most reliable available measure of audience size."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See* General Objection No. 1. Other responsive documents are publicly available. *See* General Objection No. 6; *see also* Phase II Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, 78 Fed. Reg. 64984 (Oct. 30, 2013). [*No documents identified or produced.*]

- 24) "The IT Processing Data Report is based on a sample stations selected by Marsha Kessler."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to a category of documents that includes certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the date-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0001191.

- 25) "Dr. Gray's testimony demonstrates convincingly that the Kessler sample [for 1999] although it is not random, is representative."

SDC Response: Responsive documents are publicly available and IPG has equal access. *See* General Objection No. 6; *see also* Phase II Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-2003, Direct Hearing Transcript, 433-704; 753-759 (Gray). [*No documents identified or produced.*]

- 26) ". . . the sample employs viewing results from the most distantly retransmitted broadcast stations as reported by Form 3 cable systems."

SDC Response: Responsive documents are publicly available and IPG has equal access. *See* General Objection No. 6; *see also* Testimony of Marsha Kessler, *In the matter of Distribution of the 1998-1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99. Any nonprivileged, responsive documents will be produced. *See Documents in Category No. 1, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the documents that are responsive to the IPG Request, except to make reference to a category of documents that includes certain documents that are not responsive to the Request, many of which documents are voluminous. IPG hereby requests that the SDC identify the responsive documents according to the date-number accorded to the SDC-produced documents, as well as to the citation of the voluminous testimony which is responsive.

SDC Response to IPG's Follow-Up Request: Responsive documents have been produced at SDC0000131-SDC0000241 and SDC0000242-SDC0000521.

- 27) "Finally, to test the reasonableness of the HHVH share analysis, I reviewed the Nielsen RODP to confirm the distant viewing results with local viewing of the same programs."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 5, which have been produced.*

- 28) "My analysis is that the local data is consistent with the distant viewing analysis."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1.* The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of John Sanders and its accompanying Exhibit F. Subject to the foregoing objections, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 4, which have been produced.*

- 29) "... I concluded that there was no meaningful difference in the time of day when the subject programs were telecast."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1.* Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 5, which have been produced.*

- 30) "The expense of conducting a study of the magnitude of Dr. Gray's would come close to eclipsing the amount in dispute in this case . . ."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1.* Other responsive documents are publicly available and IPG has equal access. *See General Objection No. 6; see*

also Phase I Distribution of 1998 and 1999 Cable Royalty Funds, Docket 2001-8 CARP CD 1998-1999, 69 Fed. Reg. 3606 (Jan. 26, 2004). [No documents identified or produced.]

- 31) "The expense of conducting a study of the magnitude of Dr. Gray's . . . would not likely yield a materially different result given the consistency exhibited by the HHVH and the RODP data."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Further, Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1. Other responsive documents are publicly available and IPG has equal access. See General Objection No. 6; see also Phase II Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket 2008-2 CRB CD 2000-2003, Direct Hearing Transcript, 433-704; 753-759 (Gray); Final Distribution Order, 78 Fed. Reg. 64984 (Oct. 30, 2013). [No documents identified or produced.]*

- 32) "The HHVH data on which this analysis is based has proven to be reasonably reliable"

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1. The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. See Documents in Category No. 5, which have been produced.*

- 33) "The HHVH data on which this analysis is based . . . is the best data available at a cost that is proportionate to the amount at issue."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Further, Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See General Objection No. 1. Other responsive documents are publicly available and IPG has equal access. See General Objection No. 6; see also Phase II Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket 2008-2 CRB CD 2000-2003, Direct Hearing Transcript, 433-704; 753-759 (Gray); Final Distribution Order, 78 Fed. Reg. 64984 (Oct. 30, 2013); see also Phase I Distribution of 1998 and 1999 Cable Royalty Funds, Docket 2001-8 CARP CD 1998-1999, 69 Fed. Reg. 3606 (Jan. 26, 2004). [No documents identified or produced.]*

- 34) "... the number of incidents of no valuation were nearly the same for the two parties: 16 for SDC and 13 for IPG."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. [See Exhibit 1 to the written direct Testimony of Alan G. Whitt and Appendix B to the written direct Testimony of John S. Sanders.]

- 35) "...relationships with this data can serve to confirm the results of the HHVH data employed above."

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Further, Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See* General Objection No. 1. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See* Documents in Category Nos. 5 and 7, which have been produced.

- 36) "The correlation coefficient for the HHVH shares relative to the Nielsen shares is approximately 0.75."

SDC Response: Mr. Sanders relied on his industry knowledge and experience in forming the statement. *See* General Objection No. 1. The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of John Sanders and its accompanying Exhibits. Subject to the foregoing objections, any nonprivileged, responsive documents will be produced. *See Documents in Category No. 4, which have been produced.*

All documents necessary to verify the bottom-line figures appearing in:

- 37) Appendix B.

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *[No documents identified or produced.]*

- 38) Appendix C.

SDC Response: Any nonprivileged, response documents will be produced. *See Documents in Category Nos. 3 and 6, which have been produced.*

- 39) Appendix D.

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its

accompanying Exhibit. *[No documents identified or produced.]*

40) Appendix E

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. *[No documents identified or produced.]*

41) Appendix F.

SDC Response: The SDC object to this request to the extent that IPG has already been provided with the written direct Testimony of Alan G. Whitt and its accompanying Exhibit. Subject to the foregoing objection, any nonprivileged, responsive documents will be produced. *See Documents in Category Nos. 4, 5 and 7, which have been produced.*

IPG Follow-Up Request: The SDC Response does not specifically identify the electronic records that are responsive to the IPG Request, except to make reference to categories of documents that include certain electronic records that are not responsive to the Request. IPG hereby requests that the SDC identify the responsive documents according to the bates-number accorded to the SDC-produced documents.

SDC Response to IPG's Follow-Up Request: The SDC object to this request on the same grounds that were stated in their Response tendered to IPG on December 16, 2013. Responsive documents have already been produced.

42) Nielsen Media Research, 'Report on Devotional Programs February 1999.'
Nielsen Station Index Average Week Television Audience Measurements Based on February 4 – March 3 ('Nielsen RODP').

SDC Response: Any nonprivileged, responsive documents will be produced. *See Documents in Category No. 5, which have been produced.*

**FOLLOW-UP REQUESTS BASED ON DOCUMENTS PRODUCED IN
DISCOVERY:**

As regards documents produced by the SDC, bates-stamp nos. 1-846, and described as "1998-1999 Phase I Proceeding", please produce the following:

43) Any document upon which such documents relied for the assertions contained therein, to the extent that the testimony contained therein is relevant to assertions made by the SDC in connection with the present proceedings.

SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

As regards documents produced by the SDC, bate-stamp nos. 1177-1191, and described as "Underlying Data of Alan G. Whitt", please produce the following:

- 44) Any document upon which such electronic records were derived. This request includes but is not limited to (i) the Nielsen diaries upon which any such data was based, and (ii) records identifying the number of diary respondents resulting in the figures appearing in any such electronic records.

SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

- 45) Any documents reflecting or describing any processes followed by the program file appearing at bate-stamp no. 1177, including but not limited to any document that identifies any input data relied on, or output data created by such electronic record.

SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

- 46) Any documents constituting a legend or otherwise describing the information appearing in columns or cells contained in the data files appearing at bate-stamp nos. 1178-1191.

SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

- 47) Any documents reflecting the sources of each variety of information contained in the data files appearing at bate-stamp nos. 1178-1191.

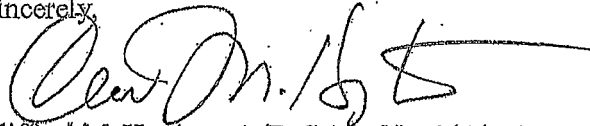
SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

- 48) Any document that attempts to integrate data and information from the electronic records produced by the SDC, and not already produced, including but not limited to any electronic record that assigns a value of "HHVH" to a cable retransmitted broadcast during 1999.

January 3, 2014
Page 14

SDC Response: Subject to and without waiving the objections previously made, the SDC have produced all responsive documents in their possession, custody, and control.

Sincerely,

A handwritten signature in dark ink, appearing to read "Clifford M. Harrington", with a long horizontal flourish extending to the right.

Clifford M. Harrington (D.C. Bar No. 218107)
Matthew J. MacLean (D.C. Bar No. 479257)
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Counsel for Settling Devotional Claimants

EXHIBIT B

MacLean, Matthew J.

From: MacLean, Matthew J.
Sent: Wednesday, February 19, 2014 12:20 PM
To: 'Brian D. Boydston, Esq.'
Cc: Harrington, Clifford M.; Lynch, Victoria N.
Subject: RE: Conference Call Today With Technical Experts

Brian,

There is a lot to your email below, much of which I disagree with. So please allow me to set forth my own rendition of the call, in which I will attempt to respond to some of the particular points of disagreement.

This conference call was intended to be the conference call between technical experts as ordered by the Judges in their Order of January 31, 2014, on IPG's motion to compel. IPG had complained that the SDC had produced certain files in formats that were not accessible to IPG. The Judges ordered that the parties were to appoint technical experts for the purpose of resolving technical issues related to the accessibility of the files.

Shortly after receiving the Judges' order, I contacted you to arrange the conference call. We agreed to hold the conference call on February 10. Shortly before that call, however, you called me to inform me that IPG had overcome the technical obstacles and therefore no longer required the call. We agreed that if you later found that you had accessibility issues, we could reschedule. We also agreed that you would not require the written explanation for accessing the files that was due on February 17. This discussion was memorialized by email. While I wish IPG had made more of an effort to access the files prior to filing its motion to compel, and prior to putting us to the effort of figuring out how to import the data files into Microsoft Access (which we understood from prior proceedings to be Mr. Galaz's preferred database application), I appreciated the call to inform me that the technical issues were resolved.

On Friday, February 14, you called me again and said that your technical people had encountered further problems, and you asked to schedule a conference call for yesterday. You were unable to tell me the nature of the problem; but you agreed to send me a written explanation in order to facilitate the discussion.

As it turned out based on the written explanation that you sent to me on Monday, the issue had nothing to do with the accessibility of the files, but rather involved Dr. Robinson's conclusion (or possibly Navigant's conclusion?) that the ".PAS" file is actually a code file in SAS (this is true), and that it does not operate on the ".CAS" files or the ".SAS7BAT" file (this is also true). We agreed to make Mr. Whitt available to discuss any issues with Dr. Robinson or whatever other technical people you wished to have available.

Although I believe that all parties to the conference call behaved in a civil manner, the call veered wildly away from the stated intent to have a discussion between technical experts. In my recollection, Dr. Robinson asked only a single question, which Mr. Whitt answered quickly. The remainder of the interview of Mr. Whitt was conducted by you and Mr. Galaz - principally Mr. Galaz. There was almost nothing asked that was arguably of a technical nature. Instead, most of the interview focused on whether we had produced all responsive documents in Mr. Whitt's possession.

As Mr. Whitt explained, the ".PAS" file is merely a piece of code (including test code) that was used as a part of his merger of the Tribune data (the ".CAS" files) with the Nielsen data (the ".SAS7BAT" file). It was not designed to conduct the merger on its own, nor is it capable of doing so. We produced this code only because Mr. Whitt happened to have it and it is marginally relevant. Although it does not operate on the original data, which we provided, it shows a portion of the algorithm used to merge the files. So we deemed it to be responsive - albeit not necessary. (One minor correction to your description below - Mr. Whitt described the code as being only a portion of the "system" used to merge the two datasets. There may have been more than one "SAS file" used in the merger.)

Mr. Whitt is not in possession of the entirety of the code used to merge the Nielsen and Tribune data, a process he conducted when his now-dissolved company was working for MPAA. The SDC have never had the code - only the results and the underlying data. The process, however, is described in Mr. Whitt's written direct statement and in his rebuttal statement in the 2000-2003 proceeding. He described it to you again yesterday. As is set forth in his written testimony, and as he described again today, it is a two-step process: First, he merged the Nielsen data with the Tribune data. Second, he culled out devotional programs using the search criteria set forth in his written direct statement. His report is the result of that process.

As you see, although the ".PAS" file might or might not be helpful to somebody in merging the Nielsen and Tribune data, it is not necessary. All that is necessary to replicate or test Mr. Whitt's results is to merge the data files - which you are now capable of accessing in full - and then to search for devotional programs using Mr. Whitt's search criteria or other search criteria of your own creation.

Mr. Galaz asked repeatedly if we were in possession of either the full SAS code or the intermediate steps in the merger of the Nielsen and Tribune data sets. As we have previously said, neither Mr. Whitt nor we are in possession of either. If we locate any further information, of course we will supplement promptly.

You asked if we have attempted to obtain the SAS code from MPAA. What information we have attempted to obtain from third parties is work product. It is also clearly beyond the scope of any discussion between technical experts concerning the accessibility of files. I advised you that we have produced the information that we have located - including all of the data necessary to replicate Mr. Whitt's results.

Of course, we disagree with any contention that we have not provided the information necessary to merge the datasets. We have given you the datasets and a description of the process to merge them. This fully enables you to test Mr. Whitt's conclusions, and it more than satisfies our discovery obligations.

Matthew J. MacLean | Pillsbury Winthrop Shaw Pittman LLP -----

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-----Original Message-----

From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Tuesday, February 18, 2014 5:46 PM
To: MacLean, Matthew J.
Cc: worldwidesg@aol.com
Subject: Conference Call Today With Technical Experts

Dear Matt,

Following our conference call today, I wanted to memorialize what was communicated in order that there be no understanding.

Our conference call came together at 2:00 p.m. EDT, and was attended by myself, Dr. Laura Robinson, and Raul Galaz, all on behalf of IPG, and yourself and Alan Whitt, all on behalf of the SDC.

Our conference call was precipitated by Dr. Robinson's review of the electronic files produced by the SDC in discovery, including one file with a "pas" file extension, thirteen files with a "cas" file extension, and one file with a "sas7bdat" file extension. As noted in a memo that was authored by Dr. Robinson and presented to you in anticipation of the meeting, Ms. Robinson was able to obtain the applicable SAS program, and asserted that the produced electronic files could not have created the final integrated results attributing "HHVH" to devotional programming for 1999 that appear in the testimony of both Mr. Whitt and Mr. John Sanders.

Specifically, Dr. Robinson asserted that the "pas" file was actually an SAS program file that appears to merge two datasets that have not been produced by the SDC in discovery (entitled "tv2day" and "nielsenfeb97w1"). Further, such "pas" program file makes no reference to the two different dataset types that actually were produced by the SDC in discovery (the "cas" files and the "sas7bdat" file). Consequently, the "pas" file was not intended to be run against the datasets that were produced in discovery and, consequently, cannot create any result, much less the result that is attached and appears as an exhibit to the testimony of both Mr. Whitt and Mr. Sanders.

In fact, Mr. Whitt confirmed all of the foregoing. He explained that the "cas" files contained Tribune Media data, that the "sas7bdat" file contained Nielsen Media Research data, and that the "intermediate" step that merges the "cas" and "sas7bdat" datasets was not produced by the SDC. You confirmed such fact as well. Mr. Whitt embellished that the "pas" file was a "subset" of the "larger SAS file" that merges the produced datasets in order to produce an "HHVH" result for all 1999 programming (i.e., in all categories, not just devotional), but that the larger SAS program file was not produced by the SDC.

It was also clarified that the results produced by that merger are subsequently culled down to just devotional program titles, but that the electronic file that performs that additional intermediate step was not produced either.

Mr. Whitt indicated that the produced "pas" file was just a "test file", and you indicated that it was produced to IPG simply to provide "an example" of what process might be followed if the SDC had produced the "intermediate step" that actually merges the "cas" and "sas7bdat" datasets in order to create various results. You stated that the SDC had never represented the "pas" file to have actually been used in the creation of the SDC-presented results.

In any event, attention was turned to the location and accessibility of the missing "intermediate step", i.e., the "larger SAS file" that was not produced yet is ostensibly responsible for the SDC-presented results. You and Mr. Whitt confirmed that you no longer have access to that electronic file, and that it was utilized in connection with Mr. Whitt's services on behalf of the MPAA in 2006. We asked whether you had requested from the MPAA access to the "larger SAS file", to which you stated that you would neither confirm nor deny making such a request of the MPAA.

Consequently, you have left us unaware of what efforts you have made in order to provide the data underlying and necessary to replicate the SDC-presented results, or whether such "larger SAS file" even exists. In any event, what is clear is that the SDC-presented results cannot be replicated with the electronic files that were produced by the SDC, and require application of an additional unproduced program, the "larger SAS file".

In sum, you offered to submit the produced electronic files in other formats (e.g., Excel, Access), but acknowledged that you still did not retain, nor had produced, the "intermediate step" necessary to merge the datasets that had been produced.

Obviously, since we were now able to view the data in SAS, converting the data to another format is no longer necessary

Please let me know promptly if I have mis-understood any of these matters or mis-stated them herein, and clarify the same.

Brian